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ART. I. — DR. CUTLER AND THE ORDINANCE OF 1787.

On the 13th of July, 1787, the Congress of the old Confederation, sitting in New York, passed "an Ordinance for the Government of the Territory Northwest of the River Ohio," which has passed into history as the "Ordinance of 1787."

The Territory embraced what is now the States of Ohio, Indiana, Illinois, Michigan, and Wisconsin. Its provisions have since been applied to all the Territories of the United States lying north of latitude $36^{\circ} 40'$, which now comprises the States of Iowa, Minnesota, Nebraska, and Oregon. August 7, 1789, the Constitution of the United States having then been adopted, Congress, among its earliest acts, passed one recognizing the binding force of the Ordinance of 1787, and adapting its provisions to the Federal Constitution.

The Ordinance, in the breadth of its conceptions, its details, and its results, has been perhaps the most notable instance of legislation that was ever enacted by the representatives of the American people. It fixed forever the character of the immigration, and of the social, political, and educational institutions of the people who were to inhabit this imperial territory, — then a wilderness, but now covered by five great States, and teeming with more than ten million persons, or one fourth of the entire population of the United States. It forever prohibited slavery and involuntary servitude, — that

pestilent element of discord and tyranny in our American system, which then existed in all the States except Massachusetts, where it had come to an end, by a decision of its Supreme Court, only four years before. It declared that "religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall always be encouraged." It prohibited the feudal law of primogeniture, and provided that the property of a parent dying intestate should be divided equally among his children or next of kin; that no person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiments; that the inhabitants shall always be entitled to the benefits of the writ of *habeas corpus*, of trial by jury, of a proportional representation in the legislature, and of judicial proceedings according to the course of the common law; that all persons shall be bailable, unless for capital offences, when the proof shall be evident, or the presumption great; that all fines shall be moderate, and no cruel and unusual punishment shall be inflicted; that no man shall be deprived of his liberty or property but by the judgment of his peers, or the law of the land; and should the public exigencies make it necessary to take any man's property, or to demand his particular services, full compensation shall be made for the same; and in the just preservation of rights and property, it is understood and declared that no law ought ever to be made or have force in said territory that shall in any manner whatever interfere with or affect private contracts or engagements *bona fide* and without fraud previously made.

This was the first embodiment in written constitutional law of a provision maintaining the obligation of contracts. Six weeks later it was, on motion of Mr. King of Massachusetts, incorporated in the draft of the Constitution of the United States.

The Ordinance further provided, that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying-places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States."

Such are some of the broad and enlightened provisions which have made the Ordinance of 1787 so beneficent and memorable. They entered not only into the organic laws of the territory, but were made perpetual and irrevocable. When new States were organized on this territory, the people were not left with the discretion of accepting or discarding the provisions of the Ordinance in their constitutions. Its vital principles, some of which have been enumerated, were embodied in six "articles of compact between the original States and the people and States of the said territory, and forever to remain unalterable unless by common consent." It was well understood that common consent to any material change could never be obtained. No other instance exists in American legislation of laws enacted under the form of "articles of compact," except in the ordinance relating to this same territory drawn by Mr. Jefferson in 1784, which will come under our notice in a later part of this discussion. If the slavery prohibition had not been an "article of compact," Indiana and Illinois, and possibly Ohio, would have been admitted into the Union as Slave States. As early as 1802 Gen. William Henry Harrison, then Governor of the Indiana Territory, and later President of the United States, called a convention of delegates to consider the means by which slavery could be introduced into the territory; and he himself presided over its deliberations. The convention voted to give its consent to the suspension of the sixth article of compact, and to memorialize Congress for its consent to the same. The memorial laid before Congress stated that the suspension of the sixth article would be highly "advantageous to the territory," and "would meet with the approbation of at least nine tenths of the good citizens of the same." The subject was referred to a committee, of which Mr. John Randolph of Virginia was chairman, who reported adversely as follows: "That the rapidly increasing population of the State of Ohio sufficiently evinces, in the opinion of your committee, that the labor of slaves is not necessary to promote the growth and settlement of colonies in that region. That this labor, demonstrably the dearest of any, can only be employed to advantage in the cultivation of products more valuable than any known in that quarter of the

United States ; that the committee deem it highly dangerous and inexpedient to impair a provision wisely calculated to promote the happiness and prosperity of the Northwestern country, and to give strength and security to that extensive frontier. In the salutary operation of this sagacious and benevolent restraint, it is believed that the inhabitants of the territory will, at no very distant day, find ample remuneration for a temporary privation of labor and of emigration." *

Ohio was admitted to the Union the same year, and in the formation of her Constitution the advocates of slavery made a bold and decided stand for its introduction, but were defeated. Several memorials were sent to Congress at a later date, from Indiana and Illinois, asking for the repeal of the antislavery prohibition, and several committees in Congress reported in favor of the repeal ; but Congress firmly maintained the integrity of the compact of 1787.

The only persons dwelling in the territory at that time were about three thousand Louisiana and Canadian French settlers on its western and northern borders, a few families in the southern border, who claimed to be citizens of Virginia, and roving tribes of Indians. Although the Ordinance protected the personal and land rights of the French settlers, among whom a few slaves were held, they took no part in the political affairs of the territory, and gradually moved across the Mississippi and into Canada. The Ordinance had, therefore, no old rubbish to clear away, and no deep-seated customs and prejudices to contend against. It stamped itself upon the soil while it was yet a wilderness, and its impress can be seen to-day in the laws, the character, the social habits, and thrift of these great Northwestern States. Compare these States with Kentucky on the south and Missouri on the west, over which this Ordinance did not extend. Across the Ohio and Mississippi Rivers can be found an order of civilization and social customs that might suggest to a Northern traveller that he was in a foreign country. This disparity in industrial habits, general education, and business enterprise was even more marked before the late war than it is now.

* Am. State Papers, Pub. Lands, I. 160.

Extend this comparison to the events which occurred from 1861 to 1865. Every square mile of territory that was covered by the Ordinance of 1787 was patriotic, and gave its men and its means for the support of the Union. South and southwest of that boundary-line were treachery and rebellion under the plausible semblance of neutrality. Kentucky and Missouri probably furnished more men who fought *against* the United States flag than fought *under* it. The Northwestern States put more than a million soldiers into the Union armies; and they were the men who fought at Forts Henry and Donelson, Pittsburg Landing, Stone River, Jackson, and Vicksburg, and achieved the only Union victories gained during the first two years of the war. If, instead of the principles of the Ordinance of 1787, the institutions of Kentucky and Missouri had been allowed to gain a foothold in these States, can any one doubt what would have been the result of the war and the fate of this Union?

If Mr. Webster were living to-day, would he not see new reasons for that splendid encomium which in 1830, in his speech in answer to Hayne, he pronounced on the Ordinance of 1787? "We are accustomed," he said, "to praise the lawgivers of antiquity; we help to perpetuate the fame of Solon and Lycurgus; but I doubt whether one single law of any lawgiver, ancient or modern, has produced effects of more distinct, marked, and lasting character than the Ordinance of 1787. We see its consequences at this moment, and we shall never cease to see them, perhaps, while the Ohio shall flow."

Judge Timothy Walker of Ohio, in an address delivered at Cincinnati in 1837, said: "Upon the surpassing excellence of this Ordinance no language of panegyric would be extravagant. It approaches as nearly to absolute perfection as anything to be found in the legislation of mankind; for after the experience of fifty years, it would perhaps be impossible to alter without marring it. In short, it is one of those matchless specimens of sagacious forecast which even the reckless spirit of innovation would not venture to assail. The emigrant knew beforehand that this was a land of the highest political as well as national promise, and under the auspices of another Moses, he journeyed with confidence towards his new Canaan."

Mr. Chase, late Chief Justice of the United States, in the introduction to his "Statutes of Ohio," said: "Never, probably, in the history of the world, did a measure of legislation so accurately fulfil, and yet so mightily exceed, the anticipations of the legislators. The Ordinance has well been described as having been a pillar of cloud by day and of fire by night in the settlement and government of the Northwestern States."

It may seem strange that, after the lapse of nearly a century, the origin and history of so important a document should still be matters of doubt, and hence of discussion. The statement is ventured with some confidence that in the whole range of topics in our national history there is none which has been more obscure, or the subject of more conflicting and erroneous statements than the one just named. No one of the general histories of the United States or of the special histories of the Western States gives any information on the subject. Mr. G. T. Curtis in his elaborate "History of the Constitution of the United States," knowing it to be the source of some of the provisions of the Constitution, has omitted to give any historical account of the Ordinance.*

Mr. Webster, in the speech which has been quoted, ascribed the authorship of the Ordinance solely to Nathan Dane of Massachusetts, and this has been the commonly received opinion on the subject since that time. Mr. Benton of Missouri, and Mr. Hayne, promptly challenged the accuracy of the statement upon the spot. "Before I proceed," said Mr. Benton, "to the main object of this reply, I must be permitted to clear away some ornamental work, and to remove some rubbish which the Senator from Massachusetts [Mr. Webster] has

* In his second volume, p. 344, is a note referring the reader, for an account of the Ordinance, to the appendix; but nothing on the subject appears in the appendix. His publishers subsequently issued a printed slip, containing a note from Mr. Curtis, dated March 20, 1858, which will be found inserted in some copies, stating the reason why this matter was omitted. After the foot-note on p. 344 had been printed, the author's attention was called to a letter written by Mr. Dane to Rufus King, which he regarded as settling the question of authorship, and hence he had cancelled the matter he had prepared. A brief extract from this letter is given, but without an intimation as to where the entire letter can be found. Mr. Dane's letter was printed by Charles King, the son of Rufus King, in the "New York Daily Tribune" of February 28, 1855, page 6. It is an important letter, and will be quoted and considered in the progress of this discussion.

placed in the way, either to decorate his own march or to embarrass mine. He has brought before us a certain Nathan Dane, of Beverly, Massachusetts, and loaded him with such an exuberance of blushing honors as no modern name has been known to merit or to claim. So much glory was caused by a single act, and that act the supposed authorship of the Ordinance of 1787, and especially the clause in it which prohibits slavery and involuntary servitude. So much encomium and such grateful consequences it seems a pity to spoil, but spoilt it must be; for Mr. Dane was no more the author of that Ordinance, sir, than you or I, who about that time were mewling and puking in our nurses' arms. That Ordinance, and especially the non-slavery clause, was not the work of Nathan Dane of Massachusetts, but of Thomas Jefferson of Virginia."

Later in the same debate Mr. Benton said: "I have already given the proof of the fact that the South is entitled to the honor of originating the clause against slavery in the Northwestern Territory. The state of the votes also upon the adoption shows that she is entitled to the honor of passing it."

Mr. Hayne commented on the subject in a similar strain. Mr. Charles King of New York, President of Columbia College, in 1855, published a paper on the Northwestern Territory, in which he claimed for his father, Rufus King, the credit of being the author of the antislavery clause in the Ordinance. Mr. Rufus King did, two years before the Ordinance was passed, propose such a clause as a supplementary provision to another ordinance; but, as we shall presently see, nothing ever came of it. He moved its committal, and never called it up for consideration. Mr. King was not a member of the Congress which passed the Ordinance of 1787, but was a member of the Convention for the formation of the Constitution in session at the same time at Philadelphia.

Hon. Edward Coles, Governor of Illinois from 1822 to 1826, read a paper before the Pennsylvania Historical Society in June, 1856, and printed by the Society, entitled "History of the Ordinance of 1787." His object was chiefly to controvert Mr. Webster's statement as to its authorship, and to claim the honor for Mr. Jefferson.

The obscurity which has hung over the subject has arisen chiefly from the fact that in the old Continental Congress the proceedings were held in secret session, and no report of its debates was preserved. Its secret journal was printed some years later; but it was kept in so meagre and careless a manner that it is impossible from it to follow the business of the sessions. It was, moreover, regarded as a breach of confidence to speak of outside, or to write about, the business of Congress. Mr. Webster, relying on the secret journal, fell into many errors. If he had information from other sources, that, in many instances, was also erroneous. It was impossible to find in print at that time the facts on which an accurate statement of the matter could be made. Mr. Dane was then living in his seventy-eighth year, and died five years later. His pastor and biographer, the Rev. Christopher T. Thayer, has given in the sketch of his life, in Stone's *History of Beverly*, no further information on the subject than is contained in Mr. Webster's statement. Mr. Thayer, two years ago, informed the writer that he never heard Mr. Dane speak of the Ordinance, and was not aware that he had written upon it. Since that time three letters of Mr. Dane, treating the subject of the Ordinance, have come to the writer's notice: 1. The letter to Rufus King, dated July 16, 1787, already noticed. 2. A letter to Daniel Webster, dated March 26, 1830 (after Mr. Webster had made his second speech in reply to Hayne), which is printed in the *Massachusetts Historical Society's Proceedings*, 1867-69, p. 475. 3. A letter to J. H. Farnham, Secretary of the Indiana Historical Society, dated May 12, 1831, and printed in the "*New York Tribune*" of June 18, 1875. In all these letters Mr. Dane claims to be the author of the Ordinance, the same claim he makes in his "*Abridgment and Digest of American Law*," Vol. VII. p. 389. That he was the member of the committee who wrote the draft of the Ordinance which was submitted to and passed by Congress, there can be no question. A clerk of the committee, under instructions, might have performed this duty. Whether he was the author of the instrument, in the higher sense of furnishing its fundamental ideas, the occasion, the personal influence, the political motives, and the strategy which were needed to carry the measure through, and what services were

rendered by other persons, are legitimate subjects of historical investigation, to which we will direct our inquiries.

Several ordinances for the government of the Northwestern Territory were before Congress from 1784 to 1787, and the first authentic information concerning them appeared in a paper prepared by Mr. Peter Force of Washington, and printed in the "National Intelligencer" of August 26, 1847. Mr. Force, when searching for materials for his "American Archives," found a parcel of manuscripts containing the original reports relating to these several ordinances, with the changes and amendments attached, their precise condition at different dates, and memoranda of the disposition made of them. His paper embodied a statement of these facts. Governor Coles, writing nine years later, was not even aware of the existence of Mr. Force's paper, and hence his statements and his conclusions were strangely inaccurate. Mr. Force's statement, valuable as it is, falls far short of being a complete account of the Ordinance. It, however, developed the fact, for the first time, that, instead of being under consideration for three years and six months, as Governor Coles and some other writers have asserted, it was, in the brief space of four successive days, drafted *de novo*, reported to Congress, took its first, second, and third reading, and was enacted by the unanimous vote of all the States present. Mr. Force was amazed at this sudden action, and confesses his inability to explain it. It is the good fortune of the writer to have in his possession original and contemporary manuscripts, and other authentic evidence, which will show how this sudden action was brought about, and who was the person that inspired and controlled this action.

It will be necessary, as a preparation for the new evidence to be presented, that a brief sketch be given of the several plans or ordinances for the government of the Northwestern Territory which were brought forward and considered by Congress prior to the real Ordinance, which was passed July 13, 1787.

On the 1st of March, 1784, a committee consisting of Mr. Jefferson of Virginia, Mr. Chase of Maryland, and Mr. Howell of Rhode Island, reported an ordinance for the temporary government of the territory, which should continue in force only until any of the ten States, whose boundaries were described,

should have a population of twenty thousand free inhabitants. It further provided that any of the States may be admitted into the Union when their number of free inhabitants is as many as any one of the least numerous of the thirteen original States; and that the several States should bear the following names: Sylvania, Michigania, Cheronesus, Assenisipia, Metropotamia, Illinoia, Saratoga, Wash ngton, Polypotamia, and Pelesipia. It proposed, also, five "articles of compact," which were quite unlike the six articles in the Ordinance of 1787. The fifth article was as follows: "That after the year 1800 of the Christian era, there shall be neither slavery nor involuntary servitude in any of the said States, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted to have been personally guilty."

The report was recommitted, and on the 22d of March a second report was made, substantially the same as the first, except that the fanciful names of the new States were stricken out. On the 19th of April, on motion of Mr. Spaight of North Carolina, seconded by Mr. Read of South Carolina, a vote was taken whether the fifth article of compact should stand. The vote was six States in the affirmative and three in the negative. In the old Congress the method of voting was quite different from that of the present Congress. All business was voted upon by States, and the affirmative vote of seven States, a majority of the original thirteen, was necessary to carry any measure. No State could vote unless it had at least two delegates present. In that case, both must vote in the affirmative, or the vote of the State was lost. If three delegates were present, two affirmative votes could carry the vote of the State. It seldom happened that as many as ten of the original thirteen States were represented at one time. Six States only voting for Mr. Jefferson's antislavery clause, it was lost. The ordinance, without any slavery restriction, passed April 23, 1784; and was, chiefly from the absence of such a restriction, a dead letter. No settlement of the territory was made under it.

The defeat of Mr. Jefferson's antislavery clause was regarded at the time as a great calamity: but Northern men soon saw that it was a most fortunate circumstance; for if slavery had been allowed to get a foothold in the territory for

sixteen years, it could not have been abolished at the end of that period. We have already seen what was the state of public sentiment in Illinois, Indiana, and Ohio at that time. Timothy Pickering of Massachusetts, writing to Rufus King, March 8, 1785, said: "I should have objected to the period proposed for the exclusion of slavery; for the admission of it for a day or an hour ought to have been forbidden. It is infinitely easier to prevent the evil at first than to eradicate it or check it at any future time. For God's sake, let one more effort be made to prevent so terrible a calamity."

March 10, 1784, seventeen days after the passage of his ordinance as amended, Mr. Jefferson resigned his seat in Congress, and, having been appointed minister to France, soon after left the country, and did not return till December, 1789. And yet Mr. Benton, Governor Coles, and others, with an entire misconception of the facts of the case, award to Mr. Jefferson the honor of being the author of the Ordinance of 1787, an entirely different instrument. Mr. Jefferson is, however, entitled to the credit of bringing forward and using his influence to carry, in opposition to the vote of his own and of every other Southern State, some sort of slavery prohibition; and especially of devising the happy idea of "articles of compact," which was made use of in the later Ordinance. Here Mr. Jefferson's claim of authorship ends.

March 16, 1785, eight days after the date of Mr. Pickering's letter just quoted, Mr. King of Massachusetts, seconded by Mr. Ellery of Rhode Island, moved that the following resolution be committed:—

"Resolved, That there shall be neither slavery nor involuntary servitude in any of the States described in the resolve of Congress of the 23d of April, 1784, otherwise than in the punishment of crimes whereof the party shall have been personally guilty; and that this regulation shall be an article of compact, and remain a fundamental principle of the Constitutions between the thirteen original States, and each of the States described in the said resolve of the 23d of April, 1784."

Eight States voted to commit, and three States (Virginia, North Carolina, and South Carolina) voted in the negative. The resolution was therefore referred to the committee of the

whole, there being then no committee on the Territories. Delaware and Georgia were not then represented by delegates in Congress. Mr. Webster was mistaken as to the disposition of this resolution. He supposed the vote was upon its passage, whereas it was only on its commitment. He says: "The votes of nine States were not yet obtained, and thus the provision was again rejected by Southern votes."* The resolution went to the committee, and was never called up for action by Mr. King, Mr. Dane, or any other member; and so far as appears, was never again alluded to. It certainly was not incorporated into any of the several plans subsequently submitted, previous to July 11, 1787; and one of these may have been drawn by Mr. Dane, he being a member of the committee who reported it.

On the 24th of March, 1786, a report was made by the grand committee of the House to whom had been referred a motion of Mr. Monroe concerning the Western Territory. On the 10th of May of the same year, a committee consisting of Mr. Monroe of Virginia, Mr. Johnson of Connecticut, Mr. King of Massachusetts, Mr. Kean of South Carolina, and Mr. Pinckney of South Carolina, reported an ordinance for the Northwest Territory, which was recommitted, and considered from time to time. This committee was appointed on motion of Mr. Dane; but he was not a member of it. On September 19 of the same year, another committee, consisting of Mr. Johnson of Connecticut, Mr. Pinckney of South Carolina, Mr. Smith of New York, Mr. Dane of Massachusetts, and Mr. Henry of Maryland, appointed to propose a plan of temporary government of the territory, made a report which was discussed from time to time for several months. April 26, 1787, the same committee reported another ordinance, which took its second reading and was amended May 9. Its third reading was assigned for the following day. May 10, the third reading

* Works, Vol. III. p. 283. Mr. Dane, also, misconceived the import of this vote. He says: "So the article against slavery was supported, March 16, 1785, by a large majority, as an article of compact, and to remain a fundamental principle in the constitutions between the thirteen original States and each of the States in said territory." (General Abridgment and Digest, Vol. VII. p. 443.) If the vote had been on its enactment it would have passed, as the vote of seven States was sufficient for that purpose.

was called for "by Massachusetts," as the record states, and probably by Mr. Dane, who was a member of the committee having it in charge. Mr. King and Mr. Gorham, both of Massachusetts, were also present. No vote was taken, and final action was postponed. Among the papers found by Mr. Force was the original draft of this ordinance as it stood on the 10th of May, and as it came down without amendment to the 9th of July, only five days before the real Ordinance of 1787 was passed. Mr. Force has printed its full text. That Mr. Dane or any other Northern man should have served on a committee which drafted such an ordinance, and called for its third reading on the 10th of May, 1787, is evidence that there were very crude ideas in Congress at that time as to what an ordinance defining the fundamental laws of the Northwestern Territory should be. It had no resemblance to the Ordinance which passed on the 13th of July. It had no restriction of slavery, none of those sublime principles as to personal and civil rights, education, religion, and morality, and the obligation of contracts, which appeared in the later Ordinance. It had no articles of compact; in short, it had none of those provisions which have made the Ordinance of 1787 so beneficial and renowned. Mr. Dane, in his letter to Mr. Webster, calls this the Report of 1786, for the reason probably that the committee was appointed in 1786. He says: "In its formation Mr. Pinckney, myself, and, I think, Smith, took a part. So little was done with the Report of 1786 that only a few lines were entered in the journals. I think the files, if to be found, will show that report was reformed, and temporary parts added to it by the committee of 1787." * Mr. Dane, in the lapse of forty-three years, had evidently forgotten the import of that report, for it was not printed in his lifetime, and he was in doubt whether it could be found. It has probably never been printed except in Mr. Force's paper, which was copied from the "National Intelligencer" into the "Western Law Journal," published at Cincinnati, for September, 1848. This report becomes important evidence in developing the history of the Ordinance of 1787, and is here reprinted: —

* *Mass. Hist. Soc. Proceedings*, 1867-69, p. 447.

AN ORDINANCE FOR THE GOVERNMENT OF THE WESTERN TERRITORY.

It is hereby ordained by the United States in Congress assembled, that there shall be appointed, from time to time, a Governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress.

There shall be appointed by Congress, from time to time, a Secretary, whose commission shall continue in force for four years, unless sooner revoked by Congress. It shall be his duty to keep and preserve the acts and laws passed by the General Assembly, and public records of the District, and of the proceedings of the Governor in his executive department, and transmit authentic copies of such acts and proceedings every six months to the Secretary of Congress.

There shall also be appointed a Court, to consist of three judges, any two of whom shall form a Court, who shall have a common-law jurisdiction, whose commissions shall continue in force during good behavior. And to secure the rights of personal liberty and property to the inhabitants and others, purchasers in the said Districts, it is hereby ordained that the inhabitants of said Districts shall always be entitled to the benefits of the act of *habeas corpus* and of the trial by jury.

The Governor and judges, or a majority of them, shall adopt and publish in the Districts such laws of the original States, criminal and civil, as may be necessary and best suited to the circumstances of the District, and report them to Congress from time to time, which shall prevail in said District until the organization of the General Assembly, unless disapproved of by Congress; but afterwards the General Assembly shall have authority to alter them as they think fit: provided, however, that said Assembly shall have no power to create perpetuities.

The Governor for the time being shall be commander-in-chief of the militia, and appoint and commission all officers in the same below the rank of general officers: all officers of that rank shall be appointed and commissioned by Congress.

Previous to the organization of the General Assembly, the Governor shall appoint such magistrates and other civil officers in each county or township as he shall find necessary for the preservation of peace and good order in the same. After the General Assembly shall be organized, the powers and duties of magistrates and other civil officers shall be regulated and defined by the said Assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the Governor.

The Governor shall, as soon as may be, proceed to lay out the District into counties and townships, subject, however, to such alterations as may thereafter be made by the Legislature, so soon as there shall be five thousand free male inhabitants, of full age, within the said District. Upon giving due proof thereof to the Governor, they shall receive authority, with time and place, to elect representatives from their counties and townships as aforesaid, to represent them in General Assembly: provided, that for every five hundred free male inhabitants, there shall be one representative, and so on progressively with the number of free male inhabitants shall the right of representation increase, until the number of representatives amount to twenty-five; after which the number and proportion of representatives shall be regulated by the Legislature: provided, that no person shall be eligible or qualified to act as a representative, unless he be a citizen of one of the United States, or have resided within such District three years, and shall likewise hold, in his own right, in fee simple, two hundred acres of land within the same: provided also, that a freehold or life estate in fifty acres of land in the said District, if a citizen of any of the United States, and two years' residence if a foreigner, in addition, shall be necessary to qualify a man as elector for the said representative.

The representatives thus elected shall serve for the term of two years, and in case of the death of a representative, or removal from office, the Governor shall issue a writ to the county or township for which he was a member, to elect another in his stead, to serve for the residue of the time.

The General Assembly shall consist of the Governor, a Legislative Council, to consist of five members, to be appointed by the United States in Congress assembled, to continue in office during pleasure, any three of whom to be a quorum; and a House of Representatives, who shall have a legislative authority complete in all cases for the good government of the said District: provided, that no act of the said General Assembly shall be construed to affect any lands the property of the United States; and provided, further, that the lands of the non-resident proprietors shall in no instance be taxed higher than the lands of residents.

All bills shall originate indifferently either in the Council or House of Representatives, and, having been passed by a majority in both Houses, shall be referred to the Governor for his assent, after obtaining which they shall be complete and valid; but no bill or legislative act whatever shall be valid, or of any force without his assent. The Governor shall have power to convene, prorogue, and dissolve the General Assembly when in his opinion it shall be expedient.

The said inhabitants or settlers shall be subject to pay a part of the Federal debts, contracted or to be contracted, and to bear a proportional part of the burdens of the Government, to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States.

The Governor, Judges, Legislative Council, Secretary, and such other officers as Congress shall at any time think proper to appoint in such District, shall take an oath or affirmation of fidelity; the Governor before the President of Congress, and all other officers before the Governor, prescribed on the 17th day of January, 1785, to the Secretary of War, *mutatis mutandis*.

Whensoever any of the said States shall have of free inhabitants as many as are equal in number to the one-thirteenth part of the citizens of the original States, to be computed from the last enumeration, such State shall be admitted by its delegates into the Congress of the United States, on an equal footing with the said original States: provided the consent of so many States in Congress is first obtained as may at that time be competent to such admission.

Resolved, That the resolutions of the 23d of April, 1784, be and the same are hereby annulled and repealed. (*Western Law Jour.* V. 534.)

The impression which this draft made upon Mr. Force's mind he expressed as follows: "Such was the Ordinance for the government of the Western Territory when it was ordered to a third reading on the 10th of May, 1787. It had then made no further progress in the development of those great principles for which it has been distinguished as one of the greatest monuments of civil jurisprudence. It made no provisions for the equal distribution of estates. It said nothing of extending the fundamental principles of civil and religious liberty,—nothing of the rights of conscience, knowledge, or education. It did not contain the articles of compact which were to remain unaltered forever unless by common consent."

We now come to the time when these great principles were for the first time brought forward. On the 9th of July a new committee was appointed, consisting of Mr. Carrington of Virginia, Mr. Dane of Massachusetts, Richard Henry Lee of Virginia, Mr. Kean of South Carolina, and Mr. Smith of New York. The new members, Carrington, Lee, and Kean, were a majority, and all Southerners. Two days later this committee

reported the great bill of rights known as the Ordinance of 1787.

Mr. Force, who accepted Mr. Webster's statement that Mr. Dane was the author of the Ordinance, was puzzled by the fact that Mr. Carrington, a new member from Virginia, was placed at the head of the committee, to the exclusion of Mr. Dane and Mr. Smith, both of whom had served on a previous committee, and he asked the reason why. Several other questions, quite as difficult of solution, must have suggested themselves to his mind. Why were three Southern members, all new men, and constituting a majority of the committee, put in charge of drafting an antislavery ordinance for a Northern territory, which had been defeated by the entire vote of the South three years before? If antislavery principles were so popular with Southern members, why did not Mr. Dane insert an antislavery clause in the ordinance which was to have taken its third reading on the 10th of May? As Mr. Johnson of Connecticut was the chairman of that committee, and three out of five of its members were Northern men, why did not the committee make it an antislavery ordinance? Whence did so much light dawn so suddenly upon the mind of Mr. Dane, when associated with a majority of Southern members on another committee? What is the explanation of the entire unanimity of feeling and action on the slavery question, then exhibited for the first and last time, in the whole history of our national legislation?

If Mr. Force had analyzed the vote by which the Ordinance passed four days after the committee was appointed, he would have been still further puzzled. New Hampshire, Rhode Island, Connecticut, Pennsylvania, and Maryland were not then represented by delegates in Congress,—all of them Northern and Middle States, except the last. Of the eight States represented, and all voting for the Ordinance, only three—Massachusetts, New York, and New Jersey—were Northern and Middle States. The Ordinance was really carried by the votes of Delaware, Virginia, North Carolina, South Carolina, and Georgia. The only individual who voted nay was Mr. Yates from New York. Mr. Dane subsequently explained this vote by saying, in his letter to Rufus King: "Yates ap-

peared in this case, as in most others, not to understand the subject at all." As there were three delegates present from New York, the vote of Mr. Yates was neutralized.

Any satisfactory history of the Ordinance of 1787 must explain the enigmas we have suggested, and it must be a full and complete explanation. When the astronomer discovers irregular movements in a planet which cannot be explained by known causes, he infers that they arise from some outside and hitherto unknown body, and he sets himself to find it. The nature of the perturbations gives him an indication of the volume and locality of the occult influence. It is evident, from the investigation we have followed, that some sudden and potent influence was brought to bear upon Congress in the early days of July, 1787, which changed the whole current of action respecting the organic law for the government of the Northwestern Territory, which inspired new ideas, and suddenly crystallized in the matchless specimen of legislation which we are considering. What was that influence? To this inquiry we will now direct our attention.

On the afternoon of July 5, a dusty traveller, in the garb of a New England clergyman, arrived in New York City, and drove up, in his one-horse sulky, to the "Plow and the Harrow," a tavern in the Bowery; and sent his horse for entertainment to the Bowery barns. Twelve days before he had left his home in the town of Ipswich, in the eastern part of Massachusetts, and had made the journey in his private carriage, there being no public conveyances at that time. His business in New York was to buy of Congress, there in session, a million and a half acres of land in the Northwest Territory for a settlement under the auspices of the "Ohio Company of Associates." His name was DR. MANASSEH CUTLER. He remained in New York and the vicinity about three weeks, bought his million and a half acres for the Ohio Company, and about four million acres for other parties. In April of the following year, the Ohio Company made the first English settlement of the Northwest Territory at Marietta, Ohio, at the mouth of the Muskingum, on the land which Dr. Cutler had bought on this occasion. General Washington, writing from Mount Vernon, two months later, said: "No colony in Amer-

ica was ever settled under such favorable auspices as that which has just commenced at the Muskingum. Information, property, and strength will be its characteristics. I know many of the settlers personally, and there never were men better calculated to promote the welfare of such a community. If I were a young man, just preparing to begin the world, or, if advanced in life, and had a family to make a provision for, I know of no country where I should rather fix my habitation than in some part of that region."* While the good Doctor was in New York transacting this business, the Ordinance of 1787 was drafted and passed. The writer has in his possession the manuscript journal Dr. Cutler kept during this period, and only extracts from it have ever been printed. This journal supplements the material which Mr. Force discovered, and shedding light upon those few days in July, enables us to see why, how, and by whom, that sudden action of Congress was inspired.

A word of explanation is needed as to the Ohio Company, and some account of Dr. Cutler, who was its agent. The close of the Revolutionary war was marked by a period of the deepest financial distress. The country was exhausted. The officers and soldiers of the army had been paid off in government certificates bearing interest, which had depreciated to one sixth of their nominal value; business was stagnant, the country was flooded with these certificates, and the government had little available income and no credit on which it could borrow money. A scheme was devised by leading officers of the late army in the eastern part of Massachusetts, to form a company, the capital of which should be these depreciated certificates, for the purchase of land from the government for actual settlement. A meeting of officers for this purpose was held at the Bunch-of-Grapes Tavern in Boston, on the 1st of March, 1786. Such a company was formed, and subscription books were opened. On the 8th of March, 1787, the subscribers to the shares met again at Brackett's Tavern in Boston, and the committee on subscriptions made so favorable a report that Dr. Cutler, one of the directors and a chaplain in the late Revolutionary army, was instructed to proceed to New York and negotiate for the purchase of the land from Congress.

* Sparks's edition of Washington's Writings, Vol. IX. p. 385.

Dr. Cutler, by his learning and personal accomplishments, was peculiarly qualified for such a mission. He was graduated twenty-two years before at Yale College. He had studied and taken regular degrees in the three learned professions of law, divinity, and medicine. As a scientist, however, he was best known. He was second, perhaps, to no living American, except Dr. Franklin, in scientific attainments. He was a member of the American Academy of Arts and Sciences at Boston, the American Philosophical Society at Philadelphia, the Massachusetts Medical Society, and other similar bodies. In the first volume of the "Memoirs of the American Academy," published in 1785, are four papers of his, on Astronomy, Meteorology, and Botany. These are their titles: —

1. Observations of the Transit of Mercury over the Sun, Nov. 12, 1782, at Ipswich.

2. Observations of an Eclipse of the Moon, March 29, 1782, and of an Eclipse of the Sun on the 12th of April following, at Ipswich.

3. Meteorological Observations at Ipswich in 1781, 1782, and 1783.

4. An Account of some Vegetable Productions naturally growing in this part of America, botanically arranged.

His paper on Botany, filling a hundred quarto pages, was the first scientific treatise on and classification of the plants of New England; and the first of the kind in this country. These papers, printed only two years before, gave him, as we see in his journal, a cordial *entrée* into all the literary and scientific circles in New York and Philadelphia. Harvard College had given him an honorary degree of A. M., and Yale College the degree of LL. D. Later Washington appointed him Judge of the Supreme Court of the Northwestern Territory, which honor he declined. Four years he was a member of Congress from the Essex district of Massachusetts, and a noted speech he there made on the subject of the Judiciary indicates the class of subjects he was competent to treat. The writer has conversed with and has letters from several aged persons who knew him intimately, and took pleasure in describing his characteristics. He was a person of stately and elegant form and courtly manners, and at the same time easy, affable, and

communicative. He was much given to relating anecdotes, and making himself agreeable. His manners particularly impressed the Southern members, with whom he chiefly associated. They had never before seen, they said, such qualities as his in a Northern man. In his mental characteristics he much resembled Dr. Franklin, who was personally one of the most agreeable of men. His favorite topics of conversation, when he had sympathetic listeners, were science and natural history. Like Dr. Franklin, he took delight in the society of beautiful and accomplished women. His journal gives the minutest descriptions of the noted ladies he met in his travels, not omitting to describe their costumes, and the mode of dressing their hair.

His association with Southern members was most likely from motives of policy. He needed their votes. There was then a feeling in Congress, as there has been since, — whether justified or not does not now concern us, — that New England did not favor the settlement of the West. The Western interests looked to the South for support rather than to the East. This feeling was manifested in the debate in 1785 concerning the sale and disposition of the Western lands. The bill of 1785, which provided for the admirable system of Western land surveys, was reported by a committee of which a majority were Northern men. The original bill provided that each township a mile square should be sold complete before the next was offered for sale; in other words, that the people should buy clean as they went, or not at all, whatever might be the nature of the surface or character of the soil. New England members were accused of inserting this provision in order to prevent the sale of the lands. Mr. King of Massachusetts was charged, without doubt unjustly, of saying that it was his intention to oppose the formation of new States in the West. It was said that Massachusetts had thirty thousand square miles of territory in the Province of Maine for sale, and it was the policy of her members to turn emigration in that direction. Mr. Madison of Virginia moved to amend this objectionable feature of the bill, and it was done with the support of Southern votes. Virginia, having ceded her claims in the Northwestern Territory to the United States, regarded her-

self as the special patron and supporter of its interests. Other States made a similar cession of their real or supposed claims, but those of Virginia were regarded as the most valid.

It was, therefore, Dr. Cutler's policy in furtherance of his Western project, to hold himself somewhat aloof from his New England associates, and to cultivate the friendship of the Southern members. Northern votes he could get when he needed them. Col. Carrington, Richard Henry Lee, and Mr. Grayson, all of Virginia, were, as appears by his journal, his warmest friends and confidential advisers. Dr. Holton, a distinguished member from Massachusetts, said he could not conceive how Dr. Cutler had so soon and so warmly engaged the friendship of members; for since he had been a member of that body he had never known so much attention paid to any one person.

With all his personal accomplishments and the spiritual graces of a New England clergyman, he had a large share of worldly wisdom. His journal furnishes evidence that the arts of the lobbyist were not invented in our day. In his business with Congress he regarded success as a duty. He found it difficult to enlist the interest of General St. Clair, the President of Congress, in his scheme. He found, also, that General St. Clair wanted to be Governor of the Northwestern Territory; and Dr. Cutler, representing the interests of the Ohio Company, intended that General Parsons of Connecticut should have that office. But he must have General St. Clair's influence, and found it necessary to pay the price. From the moment he communicated this decision, General St. Clair was warmly engaged in his interests, and the General *was* the first Governor of the Territory. In a letter written some years later to Mr. W. B. Giles of Virginia, General St. Clair said: "The office of Governor was in a great measure forced upon me." *

Mr. Dane was the representative of the Essex District in Massachusetts, where Dr. Cutler resided; he was born in Ipswich, where the Doctor was the settled minister. The latter, however, did not rely on Mr. Dane for making the acquaintance of the members of Congress. He brought letters of introduction

* Dillon's History of Indiana, p. 213.

from President Willard of Harvard College, Governor Bowdoin, and other eminent citizens of Massachusetts. He gives an inventory of these letters, forty-two in number, which includes the names of Carrington, Lee, and Smith, three of the five members who reported the Ordinance of 1787. On the morning of the 6th of July — he had arrived in New York the evening before — the first person we find him in company with was Colonel Carrington, who was introducing him to the members on the floor of Congress, just before the session of the day began. He then delivered his petition for the purchase of land in the Northwest Territory. He dined that day with Mr. Dane and Mr. Milliken, Comptroller of the Treasury, and spent the evening with several members of Congress. The next day he made the acquaintance of Mr. Hutchins, Geographer of the United States, and consulted with him about the location of the purchase; dined with General Knox, Secretary of War; and took tea with Rev. Dr. Rogers, in company with Dr. Ewing, Dr. Witherspoon, and several other noted clergymen. Dr. Rogers was very urgent that Dr. Cutler should preach for him the next day; but he declined on account of fatigue. On Monday he dined with Sir John Temple, the British Consul-General, with a large company of gentlemen connected with the government. Mr. Dane and Dr. Holton were also invited, as Massachusetts representatives, out of respect to Dr. Cutler, as Sir John graciously informed him. This series of attentions was kept up during his stay in New York, and serves to illustrate the respect which was felt for his attainments and character. These social occasions, instead of interfering with his business, gave him the best opportunities for explaining his project and urging his suit. The sale of the public lands, he claimed, would absorb the floating debt of the country, which was fatal to the public credit. The sale of land to actual settlers was the most feasible, and indeed the only path out of the financial and business prostration under which the country was then laboring. The purchase he proposed would result in an immediate and immense emigration to the West of the most enterprising and patriotic men of the Northern States, and especially from New England, who would, without expense to the government, form a barrier of defence from the British on the

north, and Indian tribes in the territory. At dinner-table with the heads of departments, the Board of the Treasury, and the leaders of public sentiment in Congress, he dwelt upon and enforced these arguments. His was the first proposal made for the purchase of the public lands. If his scheme of purchase failed, other propositions for Western settlement, he said, would fail also. His statements made a deep impression upon the heads of the government and upon the Southern members of Congress, whose influence he especially desired. They promised him their co-operation and their votes. Other parties now appeared before Congress with similar proposals of purchase for private speculation. Seeing that Dr. Cutler had more influence with Congress than they could bring to bear, they secretly placed their proposals in his hands; and he bought about five and a half million acres, of which only a million and a half were for his own company.

It was during these negotiations that the Ordinance of 1787 for the organization and government of the Northwestern Territory was drawn and passed. This, in fact, was the preliminary question to be settled; for unless the organic laws of the territory were fixed on an irrevocable basis, which harmonized with the moral, social, and political convictions of parties who were proposing to purchase, the lands would have no commercial value to them. Dr. Cutler represented Massachusetts men, who had, in their Constitution of 1780, abolished slavery, established public schools for general education, and framed the most advanced code of laws concerning the liberties and natural rights of man, civil jurisprudence, and public polity, which the world had then seen. No plan of emigration could have succeeded unless the New England man had felt that he was taking his laws and institutions with him to his Western home. The draft of an Ordinance, which had been before Congress for several months, had come down to the 9th of July in the bald and rudimentary condition in which we have seen it was offered for the third reading on the 10th of May.

Congress now awoke to the business of framing an instrument which would be satisfactory to the party proposing to purchase these lands. The interest of Southern members had been awakened and their prejudices allayed by the bland man-

ners and persuasive arguments of the Northern agent. The South really had but little interest in the slavery question as applied to this territory. It had more land than it could occupy; and Southerners probably never conceived the possibility of their needing land or votes north of the Ohio River. The chief motive of the Southern members in voting unanimously for the Ordinance was doubtless to relieve the financial embarrassment of the government, and to bring the public lands into the market at the highest price.* It must also be borne in mind that there was then, and for the next five years, more antislavery sentiment in the South than ever existed there before or since. Mr. Jefferson, Patrick Henry, George Mason, George Wythe, St. George Tucker, and other prominent men of Virginia, were theoretically pronounced abolitionists. In these years there were State abolition societies in Virginia, Maryland, and Delaware, which held regular meetings, and developed more radical opinions as to the rights of man, and the civil and social equality of the negro, than Phillips or Garrison ever uttered. There were ten of these abolition societies in the Southern States during that period. Slavery had not then become a political and sectional issue.

The first public development of a change of policy on the matter of an ordinance was on the 9th of July, when the subject was referred to a new committee. Can there be any doubt that the character of the new Ordinance had been discussed in the negotiations for the purchase, and that the members of that committee were chosen by design, and with a definite understanding of what they were to do? Colonel Carrington of Virginia was made chairman. Lee of Virginia was also put on the committee. We have seen that they were Dr. Cutler's

* The remarks of Mr. Randolph of Virginia, in February, 1803, on the question of voting land to the Ohio School Fund, illustrate this point. "He believed," he said, "that the appropriation, while it protected the interests of literature, would enhance the value of property. Can we suppose that emigration will not be promoted by it, and that the value of lands will not be enhanced by the emigrant obtaining the fullest education for his children? and is it not better to receive two dollars an acre with an appropriation for schools, than seventy-five cents an acre without such appropriation? Indubitably it is. Gentlemen who are not operated upon by this principle, and a desire to establish a liberal provision for schools, will vote against the bill." — *Annals of Cong.*, 7th Cong., 2d sess, p. 586.

intimate friends and advisers. Mr. Dane was his neighbor and representative, but there were reasons, as we shall presently see, why he was not made chairman. Mr. Smith of New York was one of the members to whom Dr. Cutler brought letters of introduction, and with whom he was intimate. Mr. Kean of South Carolina was probably a member of the Southern circle, with whom Dr. Cutler spent much of his time, whose views were known, and who would aid in carrying the three extreme Southern States. A majority of the members were composed of Southerners, in order to ward off the impression that it was a Northern measure. This committee took Dr. Cutler into their counsels, and, as his journal states, furnished him with a copy of the Ordinance which had been prepared, and asked him to make remarks and propose amendments, which he did. He delivered the draft with his remarks and amendments to the committee on the afternoon of July 10, and left New York that evening for a brief visit to Philadelphia, for the purpose of visiting Dr. Franklin, Dr. Rush, and other scientific correspondents of his,—he being a member of the American Philosophical Society of Philadelphia. He had a desire also to look in upon the Convention for the formation of the Constitution, there in session.*

He returned to New York on the evening of the 18th of July, and on the morning of the 19th called upon members of Congress. He then was shown the Ordinance which had passed on the 13th, and of which he had heard nothing during his absence.† He says: “The amendments I proposed have all been made except one, and that is better qualified. It is that we should not be subject to continental taxation until we were entitled to a full representation in Congress. This could not be

* The narrative he gives in his journal of his visit to Dr. Franklin is the most charming personal description of that eminent man which is extant. Mr. Sparks has printed it in his *Life of Dr. Franklin*, Vol. I. p. 519. Dr. Cutler's account of his visits to Dr. Rush, to the botanical garden of William Bartram, and to the studio of Charles Wilson Peale, the painter, are exceedingly interesting, and have never been printed. Dr. Rush informed him that they were endeavoring to raise a fund to establish a botanical garden in that city, and that he (Dr. Cutler) was the only person who had been named to take the superintendency, and give botanical lectures to the students in the University.

† The Ordinance was first publicly printed in the “*Pennsylvania Herald*” on the 25th of July.

fully obtained, for it was considered in Congress as offering a premium on emigration."

On the 11th of July, the day after Dr. Cutler presented his amendments and views in writing, the committee reported the Ordinance to Congress, and it took its first reading. In this stage it had no antislavery clause, though one seems to have been agreed upon in committee. The next day, the 12th, this clause was offered by Mr. Dane, and without objection accepted as an amendment. Several minor amendments were also made, which Mr. Force in his paper specifies, and on the 13th the Ordinance, as amended, was passed in Congress by a unanimous vote, eight States only being represented.

What Dr. Cutler, Mr. Dane, Colonel Carrington, or any other member of the committee contributed to the Ordinance, the public records of the time are silent concerning. Mr. Dane doubtless wrote the draft, and performed the clerical duties of the committee. Its style, however, which is smooth, compact, and elegant, is not the style of Mr. Dane, which was loose, ragged, and inelegant. "He had no graces of style," says his biographer, "either native or borrowed; neither did he ever seek for any."* Some other hand than Mr. Dane's must have been concerned in its formation and revision. Mr. Dane assumed, however, the responsibility, under an entire misapprehension of the sentiments of Congress, of withholding the anti-slavery clause till the second reading. What would the Ordinance have been for the purpose for which it was intended without that clause? In the letter he wrote to Rufus King, July 16, three days after the passage, he says: "When I drew the Ordinance, which passed, a few words excepted, as I originally formed it, I had no idea the States would agree to the sixth article prohibiting slavery, as only Massachusetts of the Eastern States was present, and therefore omitted it in the draft; but, finding the House favorably disposed on the subject, after we had completed the other parts, I moved the article, which was agreed to without opposition." This statement shows how little he had entered into the work which had been done by another Massachusetts man to prepare Congress for this action.

The fact seems to be that the Massachusetts members never

* C. T. Thayer, in *History of Beverly*, p. 143.

engaged with much zeal in any plan for settling the Northwestern Territory. They saw it would draw away the capital of their own State and thousands of its most enterprising citizens, as it did. No part of the State would suffer so much as Mr. Dane's own Essex District, where the shareholders of the Ohio Company chiefly resided. Massachusetts had an immense unoccupied territory in the Province of Maine on the market, and Maine was a part of her own jurisdiction. Dr. Cutler made use of this fact in his negotiations with Congress, — threatening, in case they did not give him the terms he desired, that the company would buy lands of Massachusetts. The Massachusetts members could not openly oppose the Western movement, because it was popular with their constituents, who had what was then called "the Ohio fever." Dr. Cutler did not have much confidence in the professed sympathy of his State delegation, and did not take them into his full confidence. He says in his journal: "Holton, I think, may be trusted; Dane must be carefully watched, notwithstanding his professions." Of Southern members he speaks thus: "Grayson, R. H. Lee, and Carrington are certainly my warm advocates. Lee tells me he has a speech, an hour long, prepared in my behalf, which he will deliver when he has an opportunity."

Mr. Dane in his letter to Rufus King seemed to be wholly unconscious of the fact that the Ordinance was a matchless specimen of legislation and jurisprudence. He rather spoke of it in apologetic terms, as a piece of patchwork hastily put together. He says: "With pleasure I communicate to you what we are doing in Congress, not so much from the consciousness that what we do is well done, as from a desire that you may be acquainted with our proceedings. . . . We have been employed about several objects, — the principal of which has been the Government enclosed [meaning the Ordinance] and the Ohio purchase. The former you will see is completed, and the latter will probably be completed to-morrow. We tried one day to patch up ——'s ideas [the name is illegible] of Western government, started new ideas, and committed the whole to Carrington, Dane, R. H. Lee, Smith, and Kean. We met several times, and at last agreed on some principles, — at least Lee, Smith, and myself. We found ourselves rather

pressed. The Ohio Company appeared to purchase a large tract of Federal lands,—about six or seven millions of acres [which is an overstatement of the quantity], and we wanted to abolish the old system, and get a better one for the government, and we finally found it necessary to adopt the best system we could get. All agreed finally to the enclosed plan except A. Yates.”*

If the Ordinance had been his own sole production, he would doubtless have been more conscious of its merits, and spoken of it in more affectionate and complimentary terms.

The Ordinance of 1787 and the Ohio purchase were parts of one and the same transaction. The purchase *would* not have been made without the Ordinance, and the Ordinance *could* not have been enacted except as an essential condition of the purchase. Both were before Congress and under consideration at the same time, and Colonel Carrington was the chairman of the committees which reported and carried through both measures. The dates of their passage were separated by an interval of only two weeks. The Ordinance has hitherto been treated as an isolated piece of legislation, and as such it has been a marvel and an enigma. When considered together, every fact in the origin and passage of the Ordinance is explained, and is found to be connected with the agency of Dr. Manasseh Cutler. He was the person of the most varied accomplishments, the widest learning, the largest personal influence, and the one most active and deeply interested in the subject-matter of the Ordinance of all who had a part in its formation. He was then forty-five years of age, and in the prime of his manhood and mental culture. Mr. Dane was eleven years younger, and only five years before had commenced the practice of law. At the age of twenty-one years he was at work on his father's farm, and had not commenced his preparation for college. Four years after graduating he spent as a school-teacher. He had written nothing at that time which was in print. Later in life, he had the reputation of an author; but his “General Abridgment and Digest of American Law” appeared from 1823 to 1829, thirty-six to forty-two years later. He entered Congress in 1785, retired

* New York Tribune, February 28, 1855.

in 1788, and was never afterwards a member of the national Legislature. In 1795 and in 1812 he served as commissioner to revise the statutes of Massachusetts. Late in life he prepared an elaborate work, entitled "A Moral and Political Survey of America," which was never printed. His affectionate biographer says of it: "The 'Survey' evinces unquestionably great research, and comprehends a vast amount of information; but it is marked with the same neglect of style which is so obvious in Mr. Dane's other writings."

The Ordinance of 1787 is a condensed abstract of the Massachusetts Constitution of 1780. Every principle contained in the former, either in a germinal or developed form, except that relating to the obligation of contracts, and some temporary provisions relating to the organization of the territorial government, is found in the latter, and often in the same phraseology. The Ohio Company, organized in Massachusetts, and mainly composed of Massachusetts men, was the party proposing to purchase these lands. That these prospective emigrants should desire and claim the privilege of living under the laws and with the institutions they had cherished and helped to frame, was as natural and reasonable as that this boon should have been granted to them by Congress. There was no intention on the part of Congress, or of any member, of forming an ordinance on this basis, until after Dr. Cutler had arrived in New York on the 5th of July. The idea was as new to Mr. Dane as to any member. His previous efforts at ordinance-making had been in another direction. The new point of procedure having been fixed, the drafting of the Ordinance was much a matter of clerical routine. The work was evidently turned over to Mr. Dane, he being the only member of the committee who was familiar with the Massachusetts Constitution. It is singular that in the several letters and statements on the subject which Mr. Dane has left behind him, no mention is made of Dr. Cutler, or of his presence in New York at that time. In his letter to Mr. King, written three days after the passage of the Ordinance, he did say that "the Ohio Company appeared to purchase a large tract of Federal lands"; but in his letters to Mr. Webster and to the Indiana Historical Society, written from forty to fifty years later, he

forgot to mention even the presence of the Ohio Company, and claimed the whole credit of the Ordinance for himself. In his letter of March 26, 1830, to Mr. Webster, he says: "In pages 389, 390, Sect. 3, Vol. VII. [of General Abridgment and Digest], I mention the Ordinance of '87 was framed, mainly, from the laws of Massachusetts. This appears on the face of it; meaning the titles to estates, and nearly all the six articles, the *permanent* and important parts of it, and some other parts; and, in order to take the credit of it to Massachusetts, I added 'this Ordinance (formed by the author, etc.) was framed,' etc. . . . I have never claimed *originality*, except in regard to the clause against impairing contracts, and perhaps the Indian article, part of the third article, including, also, religion, morality, knowledge, schools, etc." *

His claim in Appendix to the ninth volume of his "General Abridgment and Digest, Note A, published in 1830, is, owing to the obscurity of his style, difficult to understand. He quoted this note in his letter of May 12, 1831, to the Indiana Historical Society. He says: "It will be observed that provisions 4, 5, and 6, some now view as oppressive to the West, were taken from Mr. Jefferson's plan. The residue of the Ordinance consists of two descriptions, one original, as the provisions to prevent legislatures enacting laws to impair contracts previously made, to secure the Indians their rights and property, part of the titles to property made more purely republican and more completely divested of feudality than any other titles in the Union were in July, '87. The temporary organization was new, — no part of it was in the plan of '84. The other description was selected mainly from the Constitution and laws of Massachusetts, as any one may see who knows what American law was in 1787, as: 1. Titles to property by will, by deed, by descent, and by delivery. Here it may be observed that titles to lands once taking root are important, as they are usually permanent; in this case, they were planted in four hundred thousand square miles of territory, and took root, as was intended. 2. All the fundamental, perpetual articles of compact, except as below, as, first, securing forever religious liberty; second, the essential parts of a bill of rights

* Mass. Hist. Soc. Proceedings, 1867-69, p. 479.

declaring that religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and education shall forever be encouraged. These selections from the Code of Massachusetts, as also the titles to property, have created for her an extensive and lasting influence in the West, and of the most republican, liberal, and beneficial kind.” *

Some persons reading this note will understand him to say that the clause relating to religion, morality, and education was taken from the Code of Massachusetts; but such was evidently not his intention, as it would contradict the claim he made about the same time in his letter to Mr. Webster. These extracts illustrate Mr. Dane's style of writing, and the claims he has made as to the authorship of the Ordinance. None of these claims were made during the lifetime of Dr. Cutler or of any person immediately concerned in its formation.

There is nothing in the Ordinance of 1787 concerning religion, morality, knowledge, and schools which had not been practically exemplified in the laws and customs of Massachusetts, and which were not embodied in her Constitution of 1780. These principles were happily condensed in the Ordinance into a single sentence as follows: “Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.” No part of the Ordinance—the antislavery clause alone excepted—has been more noted than this sentence, and it has a place in the constitutions of several of the Western States. There is evidence tending to show that Dr. Cutler was the author of this clause; that it was one of the amendments or suggestions which he made in writing at the request of the committee. Its style, and the efforts he subsequently made for the establishment of the institutions of religion and education in the territory, to be presently noticed, render the inference highly probable. Accepted by the committee and incorporated in the draft by Mr. Dane, he (Mr. Dane) after the lapse of more than forty years may have forgotten its origin. There have been traditions and positive evidence in the family of Dr. Cutler, since his death,

* New York Tribune, July 18, 1875.

that he caused the insertion, in the Ordinance of 1787, of the clause quoted above, and also of the one relating to the prohibition of slavery. Several autograph letters are in the possession of the writer which are evidence on this point.

Dr. Joseph Torrey, an eminent physician of Salem, Mass., who married a daughter of Dr. Cutler, wrote January 30, 1847, to Judge Ephraim Cutler of Ohio as follows: "At a recent professional call at Hamilton,* Brother Temple [Cutler] produced large files of Ohio documents, but I had only time for a hasty examination. I saw among these documents the Ordinance of 1787 on a printed sheet. On its margin was written that Mr. Dane requested Dr. Cutler to suggest such provisions as he deemed advisable, and that at Dr. Cutler's instance was inserted what relates to religion, education, and slavery. These facts have long been known to me as household words." The letter further states that Hon. Caleb Cushing and Hon. Daniel Webster had inquired what agency Dr. Cutler had in framing the famous Ordinance, and as to the authorship of an anonymous pamphlet of twenty-four pages which Dr. Cutler wrote and had printed at Salem in 1787, describing the Northwestern Territory, and entitled "An Explanation of the Map which delineates that part of the Federal Lands comprehended between Pennsylvania West Line, the Ohio and Scioto Rivers, and Lake Erie." †

Temple Cutler, of Hamilton, Mass., writing September 29, 1849, to Judge Cutler of Ohio (both sons of Dr. Cutler), and speaking of the interest in New England on the subject of the Ordinance, says: "Hon. Daniel Webster is now convinced that the man whose foresight suggested some of its articles was our father."

Judge Ephraim Cutler, November 24, 1849, wrote to a gentleman making inquiries on the subject, as follows: "I visited my father at Washington during the last session he attended Congress [1804]. In his boarding-house he occupied a room with

* The town of Ipswich was divided in 1793, and the part of the town where Dr. Cutler resided was set off, and incorporated as the town of Hamilton.

† This pamphlet, now very rare, was reprinted in Nahum Ward's "Brief Sketch of the State of Ohio," Glasgow, 1822, and London, 1823; and a French translation was issued in Paris in 1789. A copy of the original pamphlet was sold at the recent auction sale of Mr. Fields's Library, in New York, for twenty-one dollars.

the reverend gentleman who represented Hampshire and the Connecticut River Counties, whose name I have forgotten. We were in conversation relative to the political concerns of Ohio, the ruling parties, and the effects of the [Ohio] Constitution in the promotion of the general interest; when he observed that he was informed that I had prepared that portion of the Ohio Constitution which contained the part of the Ordinance of July, 1787, which prohibited slavery. He wished to know if it was a fact. On my assuring him it was, he observed that he thought it a singular coincidence, as he himself had prepared that part of the Ordinance while he was in New York negotiating the purchase of the lands for the Ohio Company. I had then not seen the journal he kept while he was in New York at that time. The journal came into my possession during a visit of Dr. Torrey and my sister, Mrs. Torrey, in 1837.”*

Dr. Cutler's interest in the promotion of religion and education in the Northwestern Territory appears in his negotiations with Congress for the Ohio purchase. The general law for the survey and sale of Western lands, passed by Congress May 20, 1785, provided that one section (No. 16) in every township should be reserved for the support of common schools. Dr. Cutler was not satisfied with this provision, and demanded that Congress should donate in addition one section in every township for the support of an educated ministry, and two entire townships for the establishment and support of a university. This new claim was resisted by members of Congress. One bill passed authorizing the Ohio Company's purchase, but without these additional reservations; and Dr. Cutler would not accept it. He packed his trunk, made his parting calls, said he should leave the town immediately, and make his purchase of some of the States. This was somewhat of a ruse on his part, and it turned out as he expected. Members flocked to his room and entreated him to remain, and they would try to get more favorable terms. He wrote out these conditions as a *sine qua non* on which he would make the contract, and brought Congress to vote precisely the terms he

* Judge Cutler, from the time he was three years old till his emigration to Ohio, resided with his grandparents in Connecticut, and hence had lived with his father only on occasional visits.

dictated. He had full powers from the Company to negotiate alone the terms of the purchase; but, if he thought it advisable, when reaching New York, to associate with himself Mr. Winthrop Sargent, he could do so. Near the close of the negotiation he invited Mr. Sargent to join with him, and they both signed the contract.

In an autograph letter to his son Judge Cutler, written August 7, 1818, when he was seventy-six years of age, Dr. Cutler says: "The fact is, the people of Ohio are wholly indebted to me for procuring the grant of those townships [for the University] and the ministers' lands in the Ohio Company's purchase; and indeed for similar grants in Judge Symmes's purchase. When I applied to Congress for the purchase, no person, to my knowledge, had an idea of asking for such grants. When I mentioned it to Mr. Sargent and others friendly to the measure, they were rather opposed, fearing it would occasion an increased price for the lands. I had previously contemplated the vast benefit that must be derived from it in future time, and I made every exertion to obtain it. Mr. Sargent, indeed, cordially united with me in endeavoring to surmount the difficulties which appeared in the way, till the object was obtained. . . . It is well known to all concerned with me in transacting the business of the Ohio Company, that the establishment of a University was a first object, and lay with great weight on my mind."

The Ohio University, at Athens, the first college in the Northwest, was established on this foundation; and Dr. Cutler himself drew the act of incorporation, arranged the course of study, and selected the instructors. He was the author of that public policy which has been so beneficial to the educational interests of these Northwestern States, of reserving public lands for the support of universities.

Three of his sons came to Ohio and took prominent parts in its settlement. Dr. Cutler himself never removed his residence from Massachusetts. He came to Marietta, in his sulky, on a visit of inspection, and to attend a meeting of the Directors of the Ohio Company, in the summer of 1788, where he was honored as one of the chief promoters of the enterprise. He died in the parish where he had been the settled minister

for more than fifty-two years, July 28, 1823, at the age of eighty-one.

His eldest son, Judge Ephraim Cutler, already mentioned, was a member of the Territorial Legislature, Judge of the Court of Common Pleas, and member of the Convention which formed the Constitution of Ohio, in which he almost wholly shaped and drafted the judicial system of the State, and successfully resisted the well-laid scheme of setting aside the antislavery provision of the Ordinance. He was later a member of the State Legislature, and planned the common-school system of the State. Another son, Jervis Cutler, said to be the first emigrant who landed at Marietta, wrote a "Topographical Description of the States of Ohio, Indiana Territory and Louisiana, comprising the Ohio and Mississippi Rivers," 219 pp. 12mo, which was published in 1812, and illustrated with engravings by his own hand. Judge Cutler's son, Hon. William P. Cutler, still living at Marietta, and one of the most prominent men of Southeastern Ohio, was a member of Congress from Ohio from 1860 to 1862.

The fact that no biography of so eminent a man as Dr. Manasseh Cutler has appeared, requires a word of explanation. Twenty-seven years ago, a gentleman who had written several historical works of merit, and who is now librarian of one of the State historical societies, applied to the family of Dr. Cutler for his manuscripts and papers, in order to prepare his biography; and the papers which the family then possessed, or copies of them, were delivered to him. A printed circular, dated March 8, 1849, which he sent to the correspondents and friends of Dr. Cutler, asking for further contributions of letters and other materials, is before the writer. During these long years this gentleman has professed to be deeply interested in the work, and to be constantly finding new evidences of his subject's versatility of genius and works of usefulness; but the biography itself, for some unexplained reason, has not been published. The materials in the hands of the biographer have not been accessible to the writer in the preparation of this paper; but the family in Ohio, at the writer's request, have kindly furnished to him such papers as they possess. A recent note from the biographer assures the writer that the long-promised life of Dr. Cutler will soon appear.

The delay in the publication of his biography will explain why the name of Dr. Manasseh Cutler is not more familiar to the historical students of the Northwestern States, and has not hitherto been associated with the origin and history of the Ordinance of 1787.

WILLIAM FREDERICK POOLE.

ART. II. — *Native Races of the Pacific States*. By HUBERT HOWE BANCROFT. New York: D. Appleton & Co. — *Civilized Nations*, Vol. II.

THE first accounts of the pueblo of Mexico created a powerful sensation in Europe. In the West India Islands the Spanish discoverers found small Indian tribes under the government of chiefs; but on the continent, in the Valley of Mexico, they found a confederacy of three Indian tribes under a more advanced but similar government. In the midst of the valley was a large pueblo, the largest in America, surrounded with water, approached by causeways; in fine, a water-girt fortress impregnable to Indian assault. This pueblo presented to the Spanish adventurers the extraordinary spectacle of an Indian society lying two ethnical periods back of European society, but with a government and plan of life at once intelligent, orderly, and complete. There was aroused an insatiable curiosity for additional particulars, which has continued for three centuries, and which has called into existence a larger number of works than were ever before written upon any people of the same number and of the same importance.

The Spanish adventurers who captured the pueblo of Mexico saw a king in Montezuma, lords in Aztec chiefs, and a palace in the large joint-tenement house occupied, Indian fashion, by Montezuma and his fellow-householders. It was, perhaps, an unavoidable self-deception at the time, because they knew nothing of the Aztec social system. Unfortunately it inaugurated American aboriginal history upon a misconception of Indian life which has remained substantially unquestioned to the present hour. The first eyewitnesses gave the keynote to